In delivering judgment of this Court, Raja Azlan Shah C.J. (Malaya) (as he then was) said:–

"As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

This case was cited with approval in the recent Privy Council decision in *O.C.B.C. Limited* v. *Philip Wee Kee Puan @ Wee Kee Phuan*[6].

In yet another decision of this Court cited by Encik Subra Naicker, *Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*[7] 182, the pleading was likewise imprecise but each party knew the case presented by the other, it was held that justice required that the substantive issues between the parties should nevertheless be considered.

The learned trial judge made a lucid analysis, if we may say with respect, of certain English authorities which dealt with the scope of Order 18 rule 7, which is substantially similar to our Order 18 rule 7, commencing with *Waghorn* v. *George Wimpey & Co. Ltd.*[8] as authority for the proposition that where the evidence at the trial establishes facts different from that pleaded by the plaintiffs as constituting negligence which are not just a variation, modification or development of what has been alleged but which constitute a radical departure, the action will be dismissed.

This same test was again applied by Lord Guest *in John G. Stein & Co. Ltd.* v. *O'Hanlon*[9] who said:–

"The question is whether the case upon which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a longstanding over-hang some 30 feet from the corner. But in the way in which the evidence came out this became immaterial when the accident was proved to have taken place at about the corner .... Although this finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord Ordinary upon evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability."

The Judge then went on to examine the salient features of the present appeal. He noted that the way in which the defence was conducted showed that the appellants were aware of the contents of the police report made by the plaintiff at an early stage, and that therefore it did not come as a surprise.

He considered (and we agree with him) that there was more to the Statement of Claim than just paragraph 3, and took into account the effect of paragraphs 4 and 5.

The legal result which the plaintiff was seeking to show from the facts pleaded therefore was that the 1st defendant/appellant had failed in his duty of care to the plaintiff, resulting in the injuries and damage suffered by him. He found, on the evidence adduced that all the particulars of negligence against Ang, the 1st appellant with regard to the trailer was on the balance of probabilities proven.

He gave due weight to what he regarded as the independent evidence of the sketch plan from which he drew inferences with which we cannot take exception. Since he found that the defence had advanced no explanation whatsoever as to why or how the collision had come about, he gave judgment for the plaintiff.

We agree with this finding and would dismiss this appeal with costs here and below.

Appeal dismissed.

Solicitors: *Dulip Singh & Co., Subra Naicker & Co.*

LOH WAI LIAN v. S.E.A. HOUSING CORPORATION SDN. BHD.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) February 23 & June 28, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 266 of 1983]

Contract – Sale of land and house – Delay in completion – When cause of action accrued – Limitation – Limitation Ordinance, 1953, s. 6(1) – Housing Developers (Control and Licensing) Rules, 1970, r. 12.

Practice & Procedure – Action against housing developer for delay in completion of shophouse – When cause of action accrued – Limitation – Limitation Ordinance, 1953, s.16(1).

In this case the parties had entered into a sale and purchase agreement in respect of a piece of land and the respondents had agreed to build for the appellants a shophouse on the said land subject to certain terms and conditions, including a condition that if the said building is not completed and ready for delivery within eighteen months of the date of the agreement the vendor has to pay to the purchaser agreed liquidated damages calculated from day to day at the rate of 8% per annum on the purchase price from the date of the agreement to the date of actual completion and delivery of the building. There was a delay in completing the shophouse. Instead of obtaining possession on September 18, 1975 as agreed, delivery of the shophouse was only made more than two years later on November 7, 1977. The appellant did not make any demand for payment of liquidated damages until September 21, 1980. The respondents refused to pay and the appellant brought an action against the respondents. The writ was filed on September 9,1982. The only issue in the case was whether the appellants' claim was statute-barred by virtue of section 6(1) of the Limitation Ordinance. The Senior Assistant Registrar thought that the writ filed on September 9, 1982 was within time and he gave summary judgment in favour of the appellant. On appeal to the High Court it was held that the time started to run from September 18, 1975 and that the writ should had been filed on or before September 17, 1981. The learned judge allowed the respondent's appeal and set aside the summary judgment. The appellant appealed.

Held: (1) the learned judge was right in holding that the cause of action was founded on a breach of contract. The breach committed by the respondents was in respect of their failure to complete and give vacant possession of the shophouse within eighteen months of the date of the agreement. The appellant should have filed the action within six years from the date on which the cause of action accrued that is on September 18, 1975 and the learned judge was right in allowing the appeal and dismissing the claim;

(2) the appellant was wrong in thinking that her writ could not be issued until November 7, 1977 because the liquidated damages could not be quantified. The agreement provided that such damages were to be calculated on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Damages could therefore be ascertained under the agreement and in this case if the statement of claim had been filed on or before September 17, 1981, no court would have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable was not quantified.

Cases referred to:

(1) *Barton* v. *North Staffordshire Railway Company* (1888) 38 Ch.D. 458.
(2) *Bolo* v. *Koklan* A.I.R. 1930 P.C. 270.
(3) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.
(4) *Ahmad bin Hussin* v. *Hajjah Mek Binte Haji Hussain* [1973] 1 M.L.J. 18.
(5) *Turner* v. *Midland Railway Company* [1911] 1 K.B. 832.
(6) *Board of Trade* v. *Cayzer Irving & Co. Ltd.* [1927] A.C. 610.
(7) *Lim Kean* v. *Choo Koon* [1970] 1 M.L.J. 158.
(8) *Central Electricity Generating Board* v. *Halifax Corporation* [1962] 3 All E.R. 915.
(9) *Cheshire County Council* v. *Hopley* (1924) 130 L.T. 123.
(10) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.
(11) *Monckton* v. *Payne* [1899] 2 Q.B. 603.

FEDERAL COURT.

Joginder Singh for the appellant.
David Lingam for the respondents.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): We have dismissed this appeal and we now give our reasons.

The only issue in this appeal was whether the appellant's claim against a housing developer for liquidated damages for delay in the completion of a shophouse under a sale and purchase agreement was statute-barred by virtue of section 6(1) of the Limitation Ordinance 1953. The relevant provision of section 6(1) (a) provides:–

"Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions grounded on a contract or on tort".

The Senior Assistant Registrar thought that the writ filed on *September 9, 1982* was within time and consequently granted the appellant summary judgment under Order 14 RHC for the sum of $29,874.65. On appeal by the respondents to the High Court, Mohamed Dzaiddin, J. disagreed with the Senior Assistant Registrar. The learned Judge held the view that time started to run from *September 18, 1975* and that the writ should have been filed on or before *September 17, 1981*. He allowed the respondents' appeal and set aside the Order 14 judgment. After hearing arguments, we agreed with the learned Judge's decision that although the appellant had a good cause of action, the action was filed more than 11 months out of time and was therefore statute-barred.

Before adverting to the law, we should state briefly the material facts established by the appellant's pleading and affidavit evidence in the Order 14 proceedings. By a written agreement dated

March 18, 1974, the parties entered into a sale and purchase agreement in respect of a piece of land in Kuala Lumpur. The respondents agreed to build for the appellant on the said land a 3½ storey shophouse subject to certain terms and conditions. Under clause 17, it was provided that –

"Subject to Clause 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said Building shall be completed and ready for delivery of possession to the Purchaser within eighteen (18) calendar months from the date of this Agreement. Provided always that if the said Building is not completed and ready for delivery of possession to the Purchaser within the aforesaid period then the Vendor shall pay to the Purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said Property from such aforesaid date to the date of actual completion and delivery of possession of the said Building to the Purchaser."

There was a delay in completing the shophouse. Instead of obtaining possession on *September 18, 1975* as agreed, delivery of the shophouse was only made more than two years later on *November 7, 1977*. On the date of actual completion the appellant would have been entitled under the proviso to clause 17 to liquidated damages in the sum of $29,874.65 calculated at the agreed rate of 8% per annum on the purchase price on a delay of 779 days. The appellant did not make any demand for payment of the liquidated damages until *September 21, 1980*. The respondents made known their refusal to pay by letter dated *April 26, 1980* (see Ex. "LWL 3"). It was more than two years but less than six years after the refusal that the appellant filed her claim under clause 17 of the agreement.

Both before us and the High Court, Mr. Joginder Singh, counsel for the appellant, strenuously contended that time started to run under the Limitation Ordinance, either from November 7, 1977 (date of actual completion and delivery of possession) or from April 26, 1980 (date of respondents' refusal to pay after demand was made). In both events, the filing of the action on September 9, 1982 would be within the requisite six-year period of limitation. However, Mr. Lingam, counsel for the respondents, was unshakeable in his submission that based on the written agreement, time started to run from September 18, 1975 as that was the date when the respondents committed a breach of the agreement to complete and give vacant possession of the shophouse to the appellant "within eighteen (18) calendar months from the date of this agreement", as provided in clause 17.

Many authorities on limitation have been cited before us by Mr. Joginder Singh to show that the learned Judge was wrong in law in holding that time started to run from September 18, 1975 – the date of breach. Learned counsel both in his written and oral submissions took great pains to persuade us that there was no cause of action accruing on September 18, 1975 as appellant's right to sue only accrued on April 26, 1980 when the respondents refused the appellant's demand for liquidated damages. He argued that time started to run only upon such refusal because it was then that the respondents had threatened to infringe the appellant's right and he based that argument on the principle that "there can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted." *Barton* v. *North Staffordshire Railway Company*[1]; *Bolo* v. *Koklan*[2]; *Nasri* v. *Mesah*[3]; *Ahmad bin Hussin* v. *Hajjah Mek Binti Haji Hussain*[4] were cited as authorities. In the alternative it was argued that the quantum of liquidated damages could only be ascertained on November 7, 1977 when the shophouse was finally completed and as such a cause of action could only accrue on that date and not on September 18, 1975. As authorities *Turner* v. *Midland Railway Company*[5]; *Board of Trade* v. *Cayzer, Irvine and Company Ltd*[6]; *Lim Kean* v. *Choo Koon*[7]; *Central Electricity Generating Board* v. *Halifax Corporation*[8]; and *Cheshire County Council* v. *Hopley*[9] were cited. We had certainly felt the force of Mr. Joginder Singh's argument on behalf of the appellant but in the end we were satisfied it could not prevail. We would not propose to deal with all these authorities as we have no quarrel with them. Indeed they contain the most excellent and lucid exposition of the meaning of 'cause of action' and when 'cause of action accrues'. Although it was common ground that the only question which we had to decide was, 'when did the cause of action accrue?', it must surely be obvious that we must first determine the cause of action in the present dispute. Indeed what was the appellant's cause of action on the pleading? From his grounds of judgment, the learned Judge found that the cause of action was for breach of contract and this he made clear when he said:–

"Here, the 'right to sue' is established upon a breach

under the agreement and a breach is committed on the expiry of the eighteen months period from the date of the signing of the agreement. In my judgment, time runs from the date of the breach which is immediately after the date of delivery of vacant possession under the agreement, i.e. six years from 18th September 1975."

We have no doubt that the learned Judge was right in holding that the cause of action was founded on a breach of contract. The breach committed by the respondents was in respect of their failure to complete and give vacant possession of the shophouse within 18 months of the date of agreement. The proviso to clause 17 provided a relief but by itself it could not create a cause of action. The right to liquidated damages provided therein would only arise if there was a breach in completing and giving vacant possession within 18 months or within such extension of time as might have been allowed. For the appellant to succeed, the breach must be proved. Hence reading paragraphs 4 to 8 of appellant's Statement of Claim, it was clear to us that although the relief or remedy claimed was for liquidated and other damages, the cause of action was for breach of contract for the delay. Under section 6(1) (a) Limitation Ordinance, the appellant must therefore file the action within 6 years from the date on which the cause of action accrued. As was held at page 34 in *Nasri* v. *Mesah (ante),* a case relied upon by the learned Judge –

"In the case of actions founded on contract, therefore, time runs from breach (per Field J. in *Gibbs* v. *Guild).* In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's case).* It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run."

In this appeal the action was founded on contract and not on any other right. As the date of breach was known, there was no necessity to enter into argument about the date of infringement of right or threat of infringement of such right. The cause of action accrued on the known date of breach and time started to run from that date. The learned Judge was therefore correct in law when he held on the facts of the present case that September 18, 1975 was the date of breach and time started to run from that date, and not from the date when actual delivery and possession was made (November 7, 1977) or the date when the respondents refused to pay (August 26, 1980). In our view both events did not postpone the breach. It is an established principle that the statute runs from the earliest time at which an action could be brought (see *Nasri* v. *Mesah,* [3] *ante*). We agree with Mr. Lingam's submission that the measure of liquidated damages under the proviso to clause 17 could not affect the accrual of cause of action. Mr. Joginder Singh seemed to suggest that a distinction should be drawn between a claim of liquidated and unliquidated damages. Further, the argument appeared to be that failure on the part of the respondents to complete the shophouse within 18 months was not the sole cause of action but that the cause of action was not complete until the shophouse was actually completed and vacant possession given to the appellant. Such a proposition would in fact mean that if the respondents did not complete the shophouse, accrual of cause of action could be postponed indefinitely. We do not think that the proviso to clause 17 of the agreement could have that effect on the Limitation Ordinance in an action founded on contract. A distinction must clearly be recognised between a cause of action and the relief claimed. The date of completion of the shophouse was only necessary to quantify the maximum relief under clause 17 which could be done subsequently by evidence. It could not constitute an impediment to the cause of action being complete. The breach had occurred on September 18, 1975 giving rise to a complete cause of action, and the accrual of cause of action would not be postponed by temporary lack of evidence pertaining to maximum relief claimable resulting from such breach irrespective of whether the damages claimed were liquidated or unliquidated. In the circumstances of the present case, we would not agree to the proposition that the cause of action was not complete until the shophouse was completed. What the appellant ought to have done once the breach had occurred on September 18, 1975 was to bring an action within six years from that date. Just as in running down cases, a cause of action in tort must be kept alive within six years from date of accident, although at time of filing the writ not all quantum of damages to be claimed could be ascertained. In the same manner the liability to pay liquidated damages arose under clause 17 as soon as a delay occurred but the quantum would depend on the date of actual completion of the shophouse.

Although not pleaded in the Statement of Claim, nor canvassed before the learned Judge, Mr. Joginder Singh had developed a new argument before us on the effect of Rule 12(1) (r)

of the Housing Developers (Control and Licensing) Rules, 1970 (P.U.(A) 268 dated July 30, 1970). That rule provides:—

"Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale."

We are of the view that Rule 12(1) (r) did not carry the appellant's case any further. The proviso to clause 17 was clearly consistent with the requirement of that very Rule, although liquidated damages were agreed to instead of indemnity. The statutory requirement once inserted in the sale and purchase agreement became part of the contract and if not complied with, would constitute a breach of contract. Rule 12(1) (r) merely made it mandatory for a licensed housing developer to include such provision in the sale and purchase agreement. Failure tc do so would render the developer liable to a criminal prosecution under Rule 17, and any term in the agreement which was inconsistent with Rule 12 and not designed to comply with the requirement of the Rule would be void (see *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo*[10]). Since the provision of clause 17 was not inconsistent with Rule 12(1) (r), it was not void. Indeed at page 40 of Mr. Joginder Singh's written submission it was rightly conceded that, "Rule 12(1) (r) does not give a cause of action to the appellant". If so, similar to the proviso of clause 17, the Rule merely provided a relief or remedy to a purchaser in case of breach by the developer in completing the housing accommodation within the agreed period.

We have in fact answered appellant's alternative argument concerning the need to quantify liquidated damages before a right to sue could arise. Such requirement did not arise in this case. Where the mode of assessing liquidated damages had been agreed, Mr. Joginder Singh relied on *Turner* v. *Midland Railway Company (ante)*, *Central Electricity Generating Board* v. *Halifax Corporation (ante)* and *Monckton* v. *Payne*[11] to establish a proposition of law that time would not run from the date of breach but from the date when the damage could be ascertained. In other words, time would be suspended until the event agreed to for the purpose of ascertaining the actual quantum had crystallized. In the present case that event was said to be the actual completion and delivery of possession of the shophouse. In our view the appellant's argument was founded on a misconception of what had been laid down by Lord Guest's judgment in *Central Electricity Generating Board* v. *Halifax Corporation (ante)* and on the failure to distinguish between cause of action and the relief that could be prayed in such action. In dismissing the appeal and holding that the appellants' action was statute-barred, Lord Guest said at page 923:—

"In my opinion, on the vesting date the appellants would have been able to issue a writ containing a statement claiming payment of the money, which statement of claim would not have been struck out as disclosing no cause of action. If, of course, an action cannot be raised because it is not possible to quantify the claim, as in *Turner* v. *Midland Ry. Co.*, or because an arbitrator's award is a condition precedent to the raising of the action, as in *Scott* v. *Avery* type of case *(Board of Trade* v. *Cayzer, Irvine & Co., Ltd.)*, then time does not begin to run until these conditions have been satisfied. But if the only impediment to judgment is of a procedural character, as in *Monckton* v. *Payne*, then time begins to run, the action can be begun and the cause of action accrues."

In our view *Turner* v. *Midland Railway Co. (ante)* was not applicable as it was a claim for compensation under the English Lands Clauses Act 1845 for damages caused to property similar to claims under our Land Acquisition Act. Nor did the present appeal come under *Scott* v. *Avery* type of case which dealt with a claim under a document containing an arbitration clause. The actual completion of the shophouse was not a condition precedent to the raising of the cause of action founded on breach of contract for the delay as envisaged under clause 17. In *Turner* v. *Midland Railway Company*, it was held that until the amount of compensation was ascertained by the award of an arbitrator, no action could be brought. Therefore, time runs from the date of arbitrator's award. It was in this context that Lord Guest's judgment should be read when he referred to *Turner* v. *Midland Railway Company* and said, "an action cannot be raised because it is not possible to quantify the claim". As indicated earlier, the appellant was wrong in thinking that her writ could not be issued until November 7, 1977 because the liquidated damages could not be quantified. On the ascertainableness argument, it is a fallacy that liquidated damages were unascertainable immediately after the date of breach on September 17, 1975 since clause 17 itself had provided that such damages were to be calculated

on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Thus, even a day after the date of breach liquidated damages could be ascertained under clause 17. In any event, if the present Statement of Claim had been filed on or before September 17, 1981, no court could have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable were not quantified. The action was not an ordinary claim for money due and owing, the sum of which ought to be ascertained. It was also different from the cause of action in *Cheshire County Council* v. *Hopley (ante)* where the claim was based on an agreement wherein the ingoing tenant agreed to pay compensation which "may be due" from the County Council and as such it was held that time did not run until the amount of compensation was ascertained as it might well be that there was no money due. In *Monckton* v. *Payne (ante),* the cause of action was to recover an arbitrary fine payable by the defendant on her admission to the copyhold of her late husband. The action was held statute-barred as it was filed more than six years after her admittance to the copyhold. The delay was due to the plaintiff's failure to assess the fine within the statutory period of limitation. We fail to see how these authorities could support the legal proposition which the appellant sought to establish.

In the circumstances we held that the claim was statute-barred.

Appeal dismissed.

Solicitors: *Joginder Singh & Co.; Mohamed Akhir & Partners.*

ONG KIM HAI v. KUSAINI BIN SURIP

[F.C (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) June 18 & 19; July 12, 1984]

[Kuala Lumpur — Federal Court Civil Appeal No. 307 of 1983]

Tort — Action for damages arising out of road accident — Finding of trial judge — Failure to draw proper inferences from evidence available — Whether appeal court can interfere — No assessment of general damages by trial judge.

Damages — Road accident — No assessment of general damages by trial judge.

This was a claim by the appellant for damages arising from an accident between two motor cycles. The two motor cycles were travelling in the same direction, the respondent travelling behind the appellant. The learned trial judge after hearing the evidence of both the plaintiff and the defendent found that they gave conflicting versions of the accident and she proceeded to seek assistance from the other silent evidence, that is, the pleadings, the sketch plan, damages to the vehicles and the police photographs to decide which of the two versions could be accepted as probably the true version. She held that the appellant was wholly to blame for the accident and absolved the respondent from any blame and accordingly dismissed the action. The parties had agreed on special damages and future loss of earnings but the learned judge did not assess the quantum of general damages. The appellant appealed.

Held: (1) the learned trial judge had failed to draw the proper inferences from the evidence available. In this case the respondent could not be wholly absolved from blame and in the circumstances the blame should be apportioned 75% as the appellant's share and 25% as the respondent's share;

(2) as the learned trial judge had not assessed the general damages the case would be remitted to her for assessment of the general damages.

Cases referred to:

(1) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376.
(2) *Murugan* v. *Lew Chu Cheong* [1980] 2 M.L.J. 139.
(3) *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615.
(4) *Challoner* v. *Williams* [1975] 1 Ll. L.R. 124.
(5) *Yeoh Cheng Han* v. *Official Administrator* [1972] 2 M.L.J. 7.

FEDERAL COURT.

M.A. Krishnan for the appellant.
Miss Shu Lee King for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The claim before the trial judge was for damages arising from an accident between two motorcycles occurring near a junction at the 18th milestone Kuala Lumpur/Rawang main road. The two motorcycles were travelling in the same direction, that is, from Kuala Lumpur towards Rawang, the respondent travelling behind the appellant.

As stated in the opening remarks of the judgment of the trial Judge, only two issues were to be decided by the Judge namely (1) liability and (2) quantum on general damages since the parties had agreed to special damages at $10,910/- and future loss of earnings assessed at $59,800/-.